4 BREAKING THE LAW? VARIETIES OF SOCIAL DUMPING IN A PAN-EUROPEAN LABOUR MARKET[37]

4.1 Introduction

Where the previous chapter focused on the employer-arranged migration context and its impact on the social lives of posted workers, in this chapter I discuss the market context surrounding posted work through a study of firm cross-border recruitment practices. Firms engage in transnational hiring and, in doing so, consciously strategize across sovereign sites and arenas of regulation in order to take advantage of lower cost structures and less strict regulatory environments. These practices are part of a pervasive dynamic of labour-cost competition which is integral to the growth of capitalist markets (Bernaciak 2015). When firms transgress certain normative boundaries as a way to make themselves more competitive, they often trigger accusations of social dumping. In Europe, such accusations usually refer to normative structures inherited from the post-war national industrial relations systems of western Europe, which sought to ensure income stability for workers, humane treatment and due process in the workplace, as well as rights to workplace representation and collective action, reasonable notice prior to dismissals, and similar worker protections (Bernaciak 2015). However, business actors are constantly testing the boundaries of what is acceptable and what they can get away with (Streeck 2009) and increasing numbers of employers reject the existing norms – if not in principle, then certainly in practice. Some companies play a double game in

[37] This chapter is co-authored with Nathan Lillie and will appear in an edited book volume: Berntsen, L. and N. Lillie (2015) Breaking the law? Varieties of social dumping in a pan-European labour market. In Bernaciak, M., ed., *Market expansion and social dumping in Europe*, London: Routledge.

which they appear to support and conform to the traditional normative frameworks of industrial relations, while in fact they operate in ways that allow them to remain price competitive in unconstrained markets. For unions and society as a whole, the challenge is to enforce normative constraints on such 'unruly' (Streeck 2009: 75) employers.

Much has been written about the conditions and downward labour market pressures created by recent intra-EU labour mobility (Lillie 2012; Meardi 2012; Wagner 2014). The term 'social dumping' may be politicized and ill defined (Bernaciak 2012), but the basic premise that wages and employment in western Europe have come under pressure as a result of migration in certain occupational labour markets is indisputable (Meardi 2012). Labour mobility in the EU is creating a more competitive labour market environment – as indeed it is intended to – as EU institutional actors such as the European Court of Justice (ECJ) and the European Commission have made clear in public documents (see, e.g., European Court of Justice 2007). A premise behind EU policies and ECJ rulings is that market-making and market expansion will lead to efficiency increases. In practice, this means the removal of barriers to the free movement of workers and services, and the intensification of competition – including wage competition.[38] Regulatory regimes, and firms' ability to interact with them, have become a competitive parameter that tends to favour less restrictive and cheaper regulatory environments. Similarly, the regulation of employee posting has created new windows of opportunity for labour-cost competition by defining posted workers as those remaining partially outside the national regulatory scope of the receiving country, given that they come from different legal, social and organisational contexts (Wagner and Lillie 2014).

This chapter focuses on strategies for regulatory engagement that firms employ when they have the option of choosing between different national regulatory regimes. Drawing on examples from Finland and the Netherlands, it examines how firms hire and manage foreign labour, and how they strategize between the regulatory frameworks of various national industrial relations systems. This chapter shows that workers from low-wage countries are employed in high-wage countries under conditions that in certain respects refer back to the labour standards of their country of origin (posted work), or under contracts conditioned by host-country regulations (TWA work). On the basis of this study, three categories of firms' cost-saving regulatory engagement strategies are identified, which can also be viewed as different types of social

[38] Meier (2004), for example, argues that employee posting results in welfare gains for the EU economy as a whole, and that any application of minimum wages to such workers via the PWD can only have the effect of reducing these welfare gains.

dumping. *Regulatory evasion* refers to the violation of formal and informal national industrial relations rules, and to concealing these violations, presumably to avoid enforcement. *Regulatory arbitrage* is defined as strategizing about the regulatory treatment of a transaction in the selection between two (or more) alternative regulatory regimes from different sovereign territories (Fleischer 2010: 4). It involves conformance to formal rules, and possibly informal ones, but makes a claim for exception from the normal local rules on the basis of adherence to an alternative set of foreign rules. *Regulatory conformance* means conforming to the formal industrial relations system but potentially manipulating the rules for cost advantages. Regulatory conformance does not involve breaking industrial relations rules directly, but may put them under pressure as employers access foreign workers who may accept worse treatment than natives on an informal level.

All three practices presented in this chapter involve strategizing between rule systems – even regulatory conformance is a decision not to take advantage of foreign regulatory systems and to stick with the local regulatory regime. It is important to note that this study does not make a strict differentiation between legal and illegal, because social dumping is not just about the legality or illegality of actor behaviour, rather this chapter discusses violations of social and industrial relations norms in ways that create a certain kind of competitive dynamic (Bernaciak 2015). Interpretations of what is legal and what is illegal can vary, especially between unions and employers (see Arnholz and Eldring 2015), given that there are conflicts between legal frameworks resulting from EU regulation and overlapping national jurisdictions. Industrial relations practices and legal rules are often applied in national contexts where they conflict with formal and/or informal industrial relations norms and laws. This patchwork of EU and national regulations results in 'grey zones' where actors do not necessarily know the rules or feel invested in them.

This chapter draws on case studies from the Dutch and Finnish construction and distribution sectors. It is based on qualitative interviews with unionists, employers, employer associations and government officials about firm practices of recruiting and managing international personnel, as well as interviews with foreign workers about their jobs and working conditions. The interviews were conducted between 2005 and 2012 in Finland and from 2011 to 2013 in the Netherlands. Interview data is supplemented with media searches and reports, as well as discussions and meetings in Brussels with EU actors.

4.2 The use of the term social dumping

In the public discourse, the term *social dumping* is applied pejoratively and strategically as a way of condemning firms that seek to access the lower cost structure of labour in another country or within a country or firm. In this respect, social dumping is used as a politicized label in conflicts about who gets what work and how much they should be paid. It may also invoke a competitive aspect concerned with the way firm practices erode existing social and labour standards through regime competition (Streeck 1992) or cost-based competition founded on the characteristics of social systems, collective bargaining agreements or welfare regimes.

The fundamental premise of the social dumping frame is that it is normatively wrong for firms to make a competitive advantage out of seeking out the lowest social- and wage-cost structures they can find. The logic of free movement and economic liberalization in the EU, however, leaves no room for the normative evaluation of firms' practices as potential sources of social dumping. This is because labour standards are regarded as a potential source of competitive advantage, and the exploitation of such advantages is judged as a fundamental right. There is also an explicit outcome-focused reasoning in the 'Laval quartet' concerning the relationship between national industrial relations and EU free movement rights, which justifies the setting aside of national rules in order to boost regime competition. In the Laval decision (Laval Case C-341/05), the ECJ concludes that 'the right of trade unions of a Member State to take collective action [designed to raise the pay and conditions of posted workers above legal minimums]…is liable to make it less attractive, or more difficult, for undertakings to provide services in the territory of the host Member State, and therefore constitutes a restriction on the freedom to provide services within the meaning of Article 49 EC'. The Latvian firm Laval un Partneri had won its contract in Sweden on the basis of being able to offer services at a lower cost, therefore union (industrial) action that served to erase this cost advantage could be considered a restraint on free movement. The Court has made it clear that any attempt to interfere with strategies based on labour costs constitutes an a priori restriction on free movement. Restrictions on free movement can be justified, but the reasons for such restrictions must be substantiated, and the means used to achieve them should be proportional (Viking Case C-438/05).

Following the ECJ's reasoning, if firms observe legal minimum wages and legally extended collective agreements, and abide by the framework for intra-EU posting, they are not involved in social dumping, or at least are not doing anything that would provide grounds for unions or governments to apply sanctions. According to the ECJ, then, 'social dumping' refers to existing

minimum-wage laws and legally extended collective agreements: firms that violate legally mandated standards for labour-cost advantage are engaging in social dumping, while firms that uphold legal standards are not. If one follows this legalistic definition, social dumping becomes impossible in countries or industries where there are no minimum wages or legally extended agreements because there are no standards to violate.

In a broader view, however, social dumping is any competitive strategy that relies on accessing labour supplies that are cheaper due to looser regulatory frameworks or differences in wage levels or wage expectations. This is closer to the way the term has been used in academic discussions and political debates. Belgian politicians, for example, accuse the German meat-packing industry of social dumping precisely because there is no minimum wage in this sector and so posted workers from Central-Eastern Europe (CEE) can work there for very low wages (Debroux 2013). German-based firms, however, are simply making a competitive advantage out of the looser regulatory framework in the German meat-packing industry. This game of creating and exploiting 'regime competition' (Streeck 1992) is one of the core ways in which many scholars have tried to define what social dumping is exactly (Erickson and Kuruvilla 1994; Alber and Standing 2000; Kvist 2004; Donaghey and Teague 2006): that is to say, an economic dynamic that puts pressure on the regulatory framework to allow lower standards.

The term 'social dumping' has also been applied to governments seeking to use lower social security or labour standards as a way of attracting capital (Alber and Standing 2000; Šćepanović 2015). Although governments' market-making efforts and company's social dumping strategies are not synonymous, these two aspects are connected, because firms react to government incentives when they engage in social dumping. Low standards for workers in one context can also affect conditions for workers in other settings if the latter have to compete with the former. Growing competitive pressures create incentives for market actors to undermine or circumvent social regulations, which may lead to the erosion of the existing standards. By the same token, social dumping is encouraged by EU institutions. Kvist (2004) points out that the EU has brought about a 'dual development' in which the EU puts pressure on national social standards via competitive mechanisms, but at the same time provides EU citizens with access to EU- and national-level rights through EU legislation and jurisprudence. As observed by Höpner and Schäfer (2012), however, the dynamic created by the interaction of these two developments erodes national welfare states. The market-making agenda of the EU continuously pushes national consensus norms down the liberalization path, and social aspects are increasingly less important than market norms.

4.3 Posting, subcontracting, TWA work and social dumping

Labour mobility in Europe can occur either as posting – when an employer sends an employee abroad to perform a job – or as individual migration. These different forms occur under different regulatory frameworks (the free movement of services and the free movement of workers, respectively) and activate different sets of worker rights and protections (Dølvik and Eldring 2008). Whether workers come as posted workers or individual migrants, they most often are employed via TWAs. Posting of workers also occurs via subcontractors or between subsidiaries of multinational enterprises. The difference between a subcontractor and a TWA is that, in the latter case, the customer firm has a much greater role in organising the work. Subcontractors provide their own management and micro-organisation of production, while TWAs perform only recruitment, payroll and human resource functions (MacKenzie and Forde 2005).

Firms employing foreign workers in host countries strategically situate themselves in particular regulatory regimes or industries. In the Netherlands, for example, the benefits applicable to posted workers in the construction sector are more extensive than in the metal sector, allowing for cost savings when firms post workers under the conditions for the metal industry. TWAs can choose between situating themselves in the host country and employing the foreign workers under TWA contracts, or posting the TWA workers from the home country, or even a third country in which social security contributions are lower. With the first option, employment conditions have to be regulated in line with the host-country framework; in the second and third option, there will be a combination of host- and sending-country regulations (see table 1.3 in chapter 1).

Over the last decade, TWA work has increased significantly throughout Europe (Markova and McKay 2008) and is considered one of the most rapidly growing forms of atypical work (Schmidt 2006). In the Netherlands, TWAs are the most important providers of foreign workers (Fellini *et al.* 2007). TWAs play an important facilitating role in the migration process by offering workers 'all-inclusive' packages arranging travel, accommodation and food. Going for short tenures abroad is very much simplified through the transnational TWA sector.

The Temporary Agency Work Directive (TAWD), passed in 2008, puts forward the principle of equal treatment for TWA workers compared with direct hires at a client firm from day one of their assignment. The TAWD establishes that the basic working and employment conditions applicable to TWA workers should be at least those that would apply if they had been recruited directly by that undertaking to perform the same job. The level and

scope of implementation of the TAWD is left to EU member states to decide upon and the impact thus depends on each EU member state's own labour institutions and traditions (Wynn 2014).

The Posting of Workers Directive (PWD), passed in 1996, establishes that posted (construction) workers are entitled to the statutory minimum conditions of either their host state or sending state, whichever is better from the worker's perspective, thus extending national regulation of employment to transnational subcontractors. The Laval quartet of ECJ decisions, however, redefined the list in the PWD as a comprehensive limit to what national regulators are allowed to regulate, making it clear that governments and unions cannot seek to enforce any standards for posted workers that are not both explicitly mentioned in the PWD and set down in national law. Therefore, the full range of benefits accorded to native workers and individual migrants cannot be mandated for posted workers, but only the more limited set in the directive. Furthermore, minimum-wage laws (or the legal extension of collective agreements) and not collective bargaining per se must be the mechanism to enforce wage levels. Therefore, even when the legal wage minimums and extended collective agreements are fully applied, it is still possible that posted workers can end up being cheaper than domestically recruited workers (Lillie 2012). In Finland and the Netherlands, national labour law and collective agreement systems in principle provide for host-country regulation of wages, even under the constraints of the Laval quartet decisions, although, as will become clear from the cases, it is still possible to circumvent certain wage provisions and employment conditions.

The Netherlands and Finland are characterized by strong market regulations and high degrees of cooperation and coordination between state, capital and labour. In both the Netherlands and Finland, wages for most workers are regulated via extended sectoral collective agreements. The Netherlands also has a minimum wage, which is lower than collectively agreed wages; Finland does not have a minimum wage, but most workers are covered by legally extended collective agreements. The way pay is regulated in the Netherlands and Finland – in contrast to Germany, for example – sets a lower boundary on working standards, meaning that foreign employers employing posted workers must maintain a certain minimum-wage level set by the host country, even given the constraints of the Laval quartet. As will be shown, this does not mean that there is no legal room for labour-cost savings, but it does mean that the room for legal cost savings on wage payments through using posted workers is limited. In effect, in these countries there is a brighter line between legal and illegal behaviour in Finland and the Netherlands than in national contexts where wages are not regulated by law, because norm-

conforming firm behaviour tends to be legal, and norm-violating behaviour illegal. In contexts where legal protections are weak, but worker protections are effected through other channels, it is common to see norm-violating behaviour which is perfectly legal.

The share of foreign workers in the Dutch TWA workforce was 35 per cent in 2003, compared to 16 per cent in the workforce at large (Tijdens *et al.* 2006). More recent estimates indicate that 50 per cent of Central-Eastern Europeans working in the Netherlands are employed via TWAs (Tweede Kamer 2011: 33). Three types of TWAs were identified as active in the Dutch market: law-abiding TWAs; TWAs operating a in a grey zone; and the so-called 'mala fide', law-evading TWAs (Tweede Kamer 2011). It was estimated that around 5,000 to 6,000 law-evading TWAs were active in the market, supplying an estimated 100,000 CEE workers (De Bondt and Grijpstra 2008). In Finland, labour migration occurs through posting by subcontractors, TWA work and individual migration. The tax office noted that in 2012, 53,000 foreign construction workers were issued tax numbers (Mäkelä 2012). This would indicate that legally employed foreign labour constitutes about one-third of the Finnish construction labour force (Rakennusteollisuus 2012).

Even though conditions for migrant posted and TWA workers are relatively well regulated by Dutch and Finnish law, in practice the enforcement of these regulations to fight social dumping practices remains problematic. As a Dutch labour standard enforcement agent (2012) explained:

> It is well regulated. Only, it is so well regulated to the smallest details that it becomes very unclear. It is not simply, oh this person comes from Germany and these are the employment conditions that apply. No. So I think it needs to be made much simpler so that it is clear for everybody which regulations apply. I think that that is very important.

Effective enforcement requires extensive research into firm behaviour and gathering evidence of malpractices. For example, even just determining whether the collective labour agreement for the construction sector should be applicable to a firm's business practices is a time-consuming exercise. Another issue with foreign workers is the difficulty of cross-border enforcement because labour inspectorates from different countries collaborate very little, even though firms' cross-border practices often fall under the scope of both the sending and receiving countries' regulations regarding social security (the former) and taxes (the latter), for instance in the case of posted work.

4.4 Varieties of social dumping

As the application of regulation across spaces – whether geographical or social – has become more fragmented and contingent (Martinez Lucio and MacKenzie 2004), firm compliance with regulation has become strategic. The ability to strategize successfully between regulatory frameworks has turned into a competitive parameter, and companies have different approaches to this issue. Based on the evidence from the Dutch and Finnish construction and distribution sectors, three distinct categories of firms' cost-saving strategies in engaging with regulatory frameworks are identified: regulatory evasion, regulatory arbitrage and regulatory conformance.

4.4.1 Regulatory evasion

Regulatory evasion involves the violation of formal national industrial relations rules, and implies the concealment of these violations from regulatory authorities. Quite often, this is done by obscuring a firm's practices, or increasing the level of legal uncertainty about whether a firm's practices are illegal, by means of regulatory arbitrage. For example, by hiring employees in another national jurisdiction than the one in which the work is performed, regulatory evaders make it difficult for regulatory authorities to check whether the employment conditions meet the existing standards. Control and enforcement by compelling client firms to avoid using subcontractors who practice regulatory evasion is indeed a challenge:

> There can be highest managers, they can give the orders that we have to control this way, but lower in the organisation there can be some manager who can get some benefit, he can even get bribes from illegal subcontractors when he's using them…We can't show anything, but we know that, and even this middle management's organisation, they admit that among their members, these *rakennusmestarit* [master builders], they even admit that there are some men who are taking bribes... (Finnish trade union official, 2009)

Much of the public attention given to posted work has been due to the very poor labour conditions of some posted workers and the illegal activities of their employers. The growth of posted work has been associated with the appearance of numerous 'fly-by-night' TWAs supplying cheap labour at substandard conditions (Finnish union official interview 2005). These are so-called shell firms that disappear as soon as regulatory authorities take too close an interest; they often simply change their names and move elsewhere. Many of these firms appear to be just small entrepreneurs, using their personal contacts to deliver workers to job sites; one Finnish shop steward at a shipyard referred

to them as 'the guys with lots of chains, a mobile phone and an SUV' (Finnish shop steward interview 2009). Employers rhetorically draw a line between themselves and unscrupulous grey-market employers. In this way, they make the problem of regulatory evasion out to be a technical issue of control and enforcement (interviews with Finnish construction employers 2008; the Finnish Employers' Association 2009; and the European Construction Industry Federation 2006). However, these types of labour suppliers nonetheless are often present on the production sites of 'respectable' core firms. Many 'respectable' firms play a political double game of rhetorically supporting high standards while actually obstructing the enforcement of labour standards on the fly-by-night operators where the most serious violations tend to occur (Lillie *et al.* 2014). Therefore, while these TWAs represent only a segment of the labour market, they are not a segment apart, as some client firms and employer associations would like to present them, but rather a part of a spectrum, and an inevitable presence in the regulatory environment that permits and promotes their activities. For example, at the major power-plant construction sites of Olkiluoto 3, Finland, and at the construction of Avenue 2 in the Netherlands, they were an integral part of the production process. Some of these shady businesses operate on a larger scale, and in the case of at least one well-known example, they have professionalized as well.

The case of Atlanco Rimec demonstrates that a thin professional veneer allows even persistently and strategically evasive TWAs to access respectable client firms. Atlanco Rimec is a multinational manpower firm that has made a business out of hiring workers from low-wage EU countries for work in high-wage EU countries. It has also systematically utilized the legal uncertainty and enforcement difficulties created by the interaction of national systems and EU rules to violate national laws and industrial relations norms. While doing this hardly makes it unusual, what is unusual is that it operates on a large scale, in a systematic and apparently respectable way. Its clients are often well-known firms and household names. Atlanco presents a respectable public face, advertising itself as an 'expert in the mobilisation and management of teams of workers within the borders of Europe to meet the needs of our clients' (Atlanco Rimec website 22 October 2012). It has offices around Europe and appears to be a firm of substantial size and resources; it reported €84.3 million turnover in its 2004 Annual Report. According to research conducted by Swedish journalist Anna-Lena Norberg (2013a), the company maintains a database with information about past and current employees. There are around 500,000 names in the database, including former job applicants. In addition, the database contains addresses, phone numbers, passport and tax identification numbers, information about current and previous job locations and field of work, as well as details about personal character and behaviour (attitude, skills, punctuality,

and information concerning the premature termination of contract). For every person, the database specifies advice on possible rehiring: each worker is either recommended or blacklisted.

Atlanco Rimec consists of a network of companies, which appear in many cases to be shell firms created with the goal of avoiding legal responsibility.[39] Workers' employment can be moved from one company to another, as is illustrated by an excerpt from an Atlanco Switzerland employment contract of 2012: 'The company reserves the right to transfer the employee at any time to other companies of the group of which the company is a member on similar terms within the period of the agreement' (Norberg 2013a). This is similar to the strategy used by certain kinds of firms in the maritime shipping business where, as in the case of Atlanco Rimec, complex multinational networks of shell companies shield owners from liability (Stopford 1997).

Workers who have worked for Atlanco or one of its subsidiary firms, as well as unions that have dealt with them, accuse them of not paying regularly, of dismissing workers who complain, and of using double contracts and paying wages in violation of the relevant collective agreement and/or less than what was originally agreed. One former office staff member of Atlanco who successfully sued the company and was quoted in a Swedish news article related: 'I have worked for a long time for Atlanco and some of the workers see me as part of the company. With this judgment, I can show that I have nothing to do with Atlanco's tricky business. That is the most important thing for me' (Norberg 2013b).

By employing workers via Cyprus, sometimes without their knowledge and without workers having ever been there, Atlanco prevents its temporary staff from acquiring social security and pension rights in their home or host countries. This seems to be a side effect of locating in Cyprus rather than a deliberate action, however. At the same time, Atlanco has been at the centre of several industrial and legal disputes. Misconduct by Atlanco has been reported at the construction of the nuclear power plant in Flamanville, France, at Olkiluoto in Finland, at the Eemshaven and Avenue 2 construction sites in the

[39] In 2004, Atlanco reported the following subsidiary companies: Atlanco Limited (Republic of Ireland), Atlanco UK, Atlanco Selecção Lda (Portugal), Atlanco South Africa Pty, Atlanco Poland, Atlanco Worldwide Limited (Republic of Ireland), Atlanco S.R.O. (Czech Republic), Rimec Limited (Republic of Ireland), Rimec B.V. (the Netherlands), Rimec SRO (Czech Republic), Atlanco Spain SL, Rimec Contracting (the United Kingdom), Rimec Poland and Rimec Hungary (Norberg, 2013b). In 2013, Atlanco's website reported company contact points in four countries: Ireland, the United Kingdom, Denmark and Portugal (Atlanco Rimec website, accessed 13 May 2013).

Netherlands, and at several sites in Sweden. At Olkiluoto, Atlanco Rimec's behaviour resulted in a major work stoppage (Lillie and Sippola 2011).

At the building site in Eemshaven, several Atlanco employees did not receive the collective agreement wages. An Atlanco Rimec worker interviewed when working in the Eemshaven (2011) explained the firm's practices as follows:

> Atlanco Rimec is a dangerous firm because it abuses people…It abuses the law, in this case the Dutch law, by stretching it to find ways to circumvent it, only to rob us. It is a criminal TWA. This is the first and last time that I work with them.

Atlanco often lumps all social security deductions together so that workers cannot detect what kind of payments have been made on their behalf. This is something the before mentioned worker also discovered when he received his first payslips:

> When the first pay slips arrived, they did not provide us with any information, except for my last name, the company name, and a mysterious logo. The TWA's address is not on there, nor my personal identification number. There are no separate entries for pension or social security or tax payments. There is only a general sum. This is very secretive.

This worker contacted Atlanco about this, but they did not provide him with any explanation. The firm is known to not be forthcoming with information and has a reputation for threatening legal action to prevent its activities from being disclosed.

Regulatory evasion is made possible by the existence of the formally, legally legitimate strategy of regulatory arbitrage. The Atlanco Rimec case illustrates how legal ambiguity and enforcement difficulties mean in practice that it is difficult to draw a clear line between these two types of social dumping.

4.4.2 Strategic posting: Regulatory arbitrage

Regulatory arbitrage is the exploitation of differences between national systems within the constraints set out by the PWD. Firms that engage in regulatory arbitrage follow EU rules and the appropriate national rules, but they remain partially outside the national industrial relations framework of the host country. Firms strategically locate themselves and post employees so as to benefit from the differences between national social security systems in Europe. The PWD ensures a minimum set of rights for posted workers, including

minimum-wage standards in countries where these are present, but this list of rights does not concern social contributions. Social contributions are paid in the country from which a worker is posted (which is not necessarily the worker's home country). Tax authorities, but also trade unions in Finland, Sweden and the Netherlands have noticed that over the last few years, Cyprus, Luxembourg and Slovakia have been increasingly used as places of residency by TWAs.

Many practices of regulatory arbitrage currently fall into a grey zone in EU legislation. Unions have campaigned against the opportunities for social dumping practices that the PWD creates. For example, the European Transport Workers' Federation (ETF) noticed, after interviewing around 1,000 professional drivers in the period 2008–2012, that it is common for firms in road transport to open letter-box companies in EU member states with lower levels of social protection and lower labour standards (ETF 2012; also see Cremers, 2015). This is the case even though a posting firm is formally required to have a genuine business activity in the posting state in order to be able to legally post workers. The European Commission (2012) has published explicit rules concerning this issue, but their enforcement is weak and thus letter-box posting has become widespread.

In this study many instances of strategic posting were encountered. One example was a Portuguese TWA that posted Portuguese and Polish workers to work in the Netherlands. A Polish worker explained (2012) that he had been recruited in Poland but had received a Portuguese employment contract from a Portuguese subsidiary TWA of the Polish firm that had recruited him. Since he worked as a posted worker via Portugal, he thought all social security payments were made in Portugal, but he was not sure:

> …all such payments [pension, social security, etc.] go to Portugal. At least that is what they tell us…Time will tell [if the TWA is being truthful].

A Portuguese posted worker (2012), also on a Portuguese contract, related:

> We are basically subcontracted. We have normal benefits, housing, food and travelling. The pension and social security is paid in Portugal and taxes in the Netherlands.

The practice of regulatory arbitrage is a known phenomenon among TWAs in the construction sector, as this Dutch trade union official (2011) elaborates:

> What they [TWAs] do is look for the countries with the lowest social contributions, in this case Portugal [put them under Portuguese contracts]…and pay social fees in Portugal instead of in the Netherlands or Poland. And if you compare these rates, there is an easy difference of 25 per cent to be made.

Table 4.1 provides an overview of the cost savings that can be achieved through strategic posting. The example shows that even though the three nationals earn the same net income, posting a worker from Portugal (or Poland) saves an employer a significant amount on labour costs through the difference in social security payments.

Table 4.1. Savings made by companies through strategic posting

Dutch worker		**Portuguese worker**		**Polish worker**	
Net salary	1600	Net salary	1600	Net salary	1600
-/- soc. sec in NL	496	-/- soc. sec in Portugal	81	-/- soc. sec in Poland	350
-/- taxes in NL	81	-/- taxes in NL	81	-/- taxes in NL	81
Gross salary	2177	Gross salary	1762	Gross salary	2032

Source: Wapening in Beton (2012), p.7.

Also in regard to wages, it is possible to make cost savings compared to firms complying with host-country regulatory frameworks. In Finland, wages are set through national-level collective bargaining, with uniform minimum standards through the whole country. In the construction sector, collective agreement wages are quite often the actual wage in rural areas, particularly in the north. In the Helsinki region, however, wages have commonly been much higher than the collective agreement wages. Firms practicing regulatory arbitrage make cost savings by paying their workers exactly the collective agreement rate, employing their workers on home-country contracts, and conforming to Finnish norms only in regard to the mandatory items mentioned in the PWD (Lillie 2012). Finnish unions have de facto accepted employment on foreign contracts that comply with the PWD but not with the full range of standards to which Finnish workers are entitled – only because the workers are foreign. Furthermore, Finnish unionists and labour inspectors frequently voice suspicions that these workers are not actually receiving the wage levels they say they are, making the boundary between regulatory arbitrage and evasion difficult to define.

4.4.3 Regulatory conformance

Employers often make an argument that sourcing foreign labour is not about exploiting labour-cost differences but about finding workers for jobs for which there are no locals available, either because they do not have the skills or because no local person is willing to do that particular job. In the former case, certainly there is room for worker posting that would not trigger social dumping accusations, while the latter is in principle possible but may also be

related to the ethnicization of labour markets or the redesign of jobs in ways that make them less desirable precisely because there is a cheap labour force available to do them. Even when firms comply with the regulatory framework, they can still set in motion a social dumping dynamic. This is referred to as regulatory conformance, which means conforming to the formal industrial relations system, but manipulating the rules for cost advantage. There is generally considerable room for achieving labour-cost savings in ways that bend but do not break the rules of the national social and industrial relations systems. Often firms find it cheaper or more convenient to follow local rules than to access foreign rule systems.

In the Dutch supermarket distribution sector, for instance, firms exploit loopholes in the TWA regulatory regime to segment the labour market into domestic core workers and contingent foreign workers in order to maximize their flexibility and achieve cost savings. There are two main groups of workers: the Dutch, who usually work on permanent contracts with the client firm, and the Poles, who generally work on TWA contracts with a Dutch TWA. In the Netherlands, the collective agreement for the TWA sector provides for the 'contractual phase system' for TWA workers. The system consists of phase A, phase B and phase C contracts. Phase A is the first phase, where there is no limit on the amount of temporary contracts an employer can sign with an employee, but the total duration is maximum 78 weeks (unless other arrangements are made in a company collective labour agreement). Phase A TWA contracts can be terminated at any time and the worker has no guaranteed number of hours' work, as this Dutch TWA worker explained (2013) when interviewed about his employment contract:

> A phase A contract is a zero-hours contract…But it is only one way. Because when you say one day in advance that you cannot come to work, it is not possible. But when they [the TWA firm] say that you don't have to come, there is nothing you can do about it.

After 78 weeks, the firm must provide the employee with a phase B contract if the working relationship continues. The phase B contract gives an employee more job security because it provides a guaranteed number of hours, for example, which is not the case under phase A. However, when an employer sends the employee on a break that lasts at least 26 weeks, the worker's length of employment is reset and the worker can be rehired by the same firm on a phase A contract again. This is general practice for the Polish TWA workers in this industry, as this Polish TWA worker explained (2013):

> I had been working for 1.5 years in phase A. Then I had a six-month break, well it was a forced break. Then I came back and I have been working for

> six months now…In phase A they can sack you any time and it overall lasts for 78 weeks. Then you either receive phase B or you are sacked. There is a policy of almost never giving phase B. Once you have worked for that period, then you are simply kicked out.

The firms' practices comply with the letter of the regulatory framework for the TWA sector. However, they do so in a way that undermines the intention of the collective labour agreement, which is to provide workers with a longer length of employment and more job security. In the sector examined here, the regulations are used in such a manner that Polish TWA workers almost never attain this more secure phase of employment. As a result, even though firms do not violate the rules enshrined in law, they do violate the expectations that unions had when they concluded the collective agreement. Recent industrial actions organised in 2013 by the Dutch FNV union and Dutch and Polish distribution workers against this form of insecurity show that the unions consider this a violation of the spirit if not the letter of the collective agreement, protesting that this was not in line with the client firms' proclaimed corporate socially responsible behaviour. Their actions forced the client firms to change their policies; the latter agreed to stop this practice of resetting the length of employment of the Polish workers they hire via TWAs and instead to accumulate the total length of employment in the future (see chapter 7 for more information on this).

4.5 Conclusion

The different sectoral and national regulatory structures that are in place inform firm strategies. More lax regulation in one sphere attracts firms seeking cost advantages that subsequently employ workers under that particular regime. Countries with less extensive social security systems, such as Cyprus, attract letter-box posting companies that post workers all around Europe to save on indirect labour costs. Differences in industry arrangements makes employing scaffolders, for example, for wages set by the collective agreement for the metal sector in the Netherlands a lucrative option because these are lower than the wages set in the construction collective agreement. Firms also strategize in terms of the way they operate and structure their firm: for example, do they operate as TWA, a posting subcontractor firm or a posting TWA? For each type of firm, different regulations apply and provide the firm with different responsibilities towards their employees.

EU regulations on transnational employment relations are not yet well established and firms exploit existing legal uncertainties to their advantage. Firms often change appearances using shell companies when it seems strategic

to do so. Many workers interviewed in this study were unsure about where their contractual employer was legally based, given that many of these firms have branches in several European countries. The fact that EU law leaves room for firms to move between and exploit different regulatory regimes without problems makes legal abuses difficult to detect for the controlling and enforcing authorities.

The categorization presented in this chapter captures firms' social dumping practices using examples that can clearly fit into one category or the other. In reality, of course, firms experiment and move fluidly between one strategy and another. Certain instances of regulatory arbitrage, such as the case of a Portuguese posted construction worker discussed earlier, seem to be legally sound. Others, such as the case of the Polish construction worker recruited in Poland but posted via a Portuguese TWA to the Netherlands, represent an abuse of the posting regulations according to trade unions. Since enforcement remains ineffective and since jurisprudence on posted workers' employment rights remains slim, firms continue to operate via these channels and within these grey zones, pushing the boundaries of the regulatory system.

In this chapter it is argued that due to its vagueness, the discursive use of the term 'social dumping' does not capture differing firm practices nor delineate the defining feature of social dumping: the norm-undermining and norm-violating tendency of this type of behaviour. The fact that firms involved in regulatory arbitrage operate in a legal grey zone where effective enforcement is lacking makes regulatory evasion hard to detect and control. As a result, firms experiment with cost-saving social dumping practices without having to take the risk of getting caught or punished. Furthermore, it creates a dynamic where the ability and willingness to violate norms becomes a competitive parameter. In cases where the national framework itself offers opportunities for cost-saving, as in the Dutch distribution sector, firms can engage in social dumping while still complying with national industrial relations frameworks.

The term 'social dumping' can thus be used to label different forms of firms' strategic engagement with regulatory frameworks undertaken to achieve costs savings. In this chapter, a taxonomy of firms' social dumping practices is proposed that encompasses regulatory compliance, regulatory evasion and regulatory arbitrage. The examples discussed in this chapter to illustrate the three types of behaviour are not limited to these countries, sectors or firms, rather are widespread in Europe. The EU market-making agenda creates opportunities for firms to continuously push and often transgress the boundaries of regulatory systems because the profits are high and the risks of punishment remain low due to inefficient enforcement.

This chapter concludes the first part. The social and market context as discussed in these two chapters impacts the potential for individual and collective agency of migrant workers and trade unions, which is the focus in the second part of this thesis.

PART II: AGENCY OF LABOUR